No. 79-520

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

DAVID L. LINFIELD, PETITIONER

v.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

David L. Linfield
45 Tehama Street
Brooklyn, New York
11218

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1 (a) The following lists in reverse chronological order the documents of the courts or administrative agencies.

(i) Court of Appeals of the State of New York - 7/9/79, 4/23/79, 3/27/79

(ii) Special Term - 3/11/79

(iii) Court of Appeals 12/29/78

(iv) Appellate Division -11/28/78, 7/27/78

(v) State of New York Committee on Public Access to Records - 6/27/78

(vi) Supreme Court of the United States - 3/6/78

(vii) Court of Appeals - 1/10/78, 12/2/77

(viii) State Commission on Judicial Conduct - 11/28/77

(ix) Special Term - 11/15/77, 6/30/77, 3/8/77

(x) American Arbitration Association - 12/18/76.

1 (b) (i) We pray the court to review the decision of July 9, 1979 concerning motion number 517 and made by the Court of Appeals of the State of New York. The text of this decision is found in this petition on page 17.

1 (b) (ii) The authority of the Supreme Court to hear this case is derived from the authority of the court to insure to every citizen equal protection of the laws. The suffering of the petitioner, an older worker and long term public servant, from affirmative action exceeds reasonable and merciful limits. Thus the fourteenth amendment was violated. The insistence of the courts of New York State that the petitioner waive constitutional rights is unconstitutional. The Supreme Court has the authority to declare that the arbital award is neither final nor definite

because there was no arbital inquiry into the role that local racial faction played in the petitioner's loss of livelihood.

1 (c) The following questions are presented for review:

May a middle aged and long term public servant lose his livelihood due to affirmative action?

May an arbital award which prima facie sustains the loss of livelihood of a middle aged and long term employee be final and definite when there is no inquiry whatsoever in the role that local racial faction played in that loss of livelihood?

May state courts give a petitioner the following choice: waive fourteenth amendment rights or there will be no further judicial

proceedings?

1 (d) The fourteenth amendment to the constitution.

1 (e) The petitioner is fifty one years old, native born caucasian, citizen, and honorably discharged veteran. As of today, he has worked the equivalent of fifteen full time years teaching mathematics at the City University of New York (abbreviated CUNY). Twice, in 1969 and in 1975, he lost his job at CUNY due to affirmative action. The 1975 loss of job was also a loss of livelihood. The petitioner's total earnings in the last four years were about thirty seven thousand dollars. Had he not been an innocent victim of affirmative action, he would have earned about ninety thousand dollars in the last four years. As an older worker with a dismal economic

future, no job security whatsoever and no pension, the petitioner has a reduced life expectancy. The oncoming depression makes the preceeding remarks particularly painful and bitter to the petitioner.

The petitioner's detailed and juridical summary of the record on appeal is his brief and counterbrief to the Appellate Division of the First Judicial Department of the Supreme Court of the State of New York. (Appellate Division index no. 4071-72.) About twenty copies of the record on appeal were given to the appellate division.

A one paragraph summary of the approximately one thousand page record on appeal is given by noting that the following white citizens are mentioned prominently in that record:

Brooklyn College's Professor Edward Otto Lutz who, in 1974, spoke for the petitioner in the name of the NYC teachers' union which stabs individual workers in the back for the sake of affirmative action; Brooklyn College's Professor Lester Gavurin who earns about forty thousand dollars a year from the national treasury and who spoke, on December 17, 1974, at a hearing before Hearing Officer Nicholas Schunke; Brooklyn College's Counsel Robert J. Grossman who, in 1975, compared the federal constitution either to mothers' day or apple pie; Nicholas Schunke who, in 1976, submitted in absentia to Arbitrator Stutz a pitiless affidavit against the livelihood of the petitioner; Adversary Counsel Mary P. Bass who, in 1977, elliptically admitted much to the Hon. Justice Stecher; and Adversary Counsel

J. Oliver Gluyas III who, in 1978, did not share Appellate Judge Louis J. Capozzoli's off the record enthusiasm for compromise suggested by the petitioner.

The petitioner reaffirms that he is anxious to compromise.

Arbitrator Robert L. Stutz was jointly appointed by CUNY and the NYC teachers' union. His award of 1976, in American Arbitration Association case no. 1339-0400-75, states, "Mr. Linfield argued passionately ... that he has been the victim of racial discrimination by a 'racial faction' at Brooklyn College which he describes as 'a white political elite united with Blacks and Hispanics to rule Brooklyn College's remedial program.' The gravaman of Mr. Linfield's charge is that he, a native born caucasian, was

denied reappointment while a non-native-born black, who had taught the same subjects that he did, was reappointed in 1973 with a certificate of continuous employment." Mr. Stutz was referring to Mr. Okello Onyango from Kenya.

The petitioner filed a petition in State Supreme Court in Manhattan to have that deceptive and personally disastrous award vacated (special term no. 77-03635). The case was heard by the Hon. Justice Martin B. Stecher. Justice Stecher ignored the references to Mr. Onyango and to a local racial faction.

Justice Stecher refused to vacate the award. His decision of 1977 stated, "The assertion that the arbitrator so imperfectly executed his power that a final and definite award

on the subject was not made is patently without merit ... Petitioner misconstrues the role of the arbitrator when he complains that the arbitrator did not inquire into certain facts." The petitioner maintains that the constitutional truth is the following: the award is neither final nor definite because there was a failure of full inquiry into the role that local racial faction played in the instant case. Indeed, there was no such inquiry whatsoever. That the petitioner was railroaded out of his livelihood by local racial faction is the historical truth.

Justice Stecher shifted the focus from a local racial faction doing in, for racial reasons, a middle-aged long-term public servant and from the deceptions of the award to the "miscon-

ceptions" of the petitioner. But if a poor American sees his oppression, the racial perversion of justice continued in arbitration, he need not fear the strength of local racial faction, for there is a court above arbitration, a higher court above that, and still a higher court.

Furthermore, the Hon. Justice Stecher insisted then, and he has clung to that view for more than three yars, the state courts will do nothing until the petitioner waives constitutional rights. In its letter of December 29, 1978, the Court of Appeals stated that Special Term may have "leave to amend the petition." Promptly, the petitioner made a motion to Special Term asking Special Term to specify what rights of such amendment it might have. Justice Stecher re-

jected the petitioner's motion on or about March 11, 1979, writing, "The motion is denied with leave to renew if the plaintiff is so advised. I do not understand the relief requested. The letter from the court of appeals refers to leave to amend already granted by me, not to leave which may hereafter be granted." It is a constitutional fact that no meaningful leave to amend the petition was ever granted by Judge Stecher. On or about November 28, 1978, the Appellate Division confirmed "for the reasons stated by Stecher, J." (Appellate Division no. 4071-72).

On July 9, 1979, the Court of Appeals rejected the petitioner for the third time. If, as the petitioner suspects, the Court of Appeals has on file a secret memorandum of law in the instant case, I pray to the Supreme

Court to obtain it. (Re motions 517 of 1979, 274 of 1978, and 1233 of 1977.)

Both Special Term (motion 77-03635 of 1977) and the Appellate Division (motion M2279 of 1979) declined to order the production of documents which apparently the State of New York Committee on Public Access to Records believes are in the public domain. This is my second appeal to the Supreme Court of the United States (77-1071).

I am absolutely certain the court will vacate the award either while I live or posthumously. Hubert Humphrey said, "I will never give up and I will never give in." Inexorably, the vague formula "no substantial constitutional question is directly involved" becomes increasingly cruel. James Madison opposed the power and

right of local faction to deny to any American citizen his civil rights.

1 (f) That the petitioner requested that the arbital award be vacated by the lowest court and that certain documents be ordered produced in clear from the letter of Justice Stecher to the Hon. Seymour Bieber dated March 8, 1977 and found in section (i) of this appeal for certiorari.

1 (h) Affirmative action has made it nearly impossible for the national governments of Canada and the United Kingdom to exercise full national authority in their territories. In the nineteenth and twentieth centuries, with the exception of Switzerland, no country has given group economic rights to a racial or ethnic group and maintained its national integrity and the

individual liberty of its citizens.

In the course of human events, the unexpected and unthinkable happen again and again. The first fruit of affirmative action in our country has been the creation of a de facto racial authority representing twelve percent of our population. Affirmative action gives economic grass-roots power to that extra constitutional authority. Racial authority is deeply against the individual liberties and rights of American citizens regardless of race, and in favor of racial rights even if obtained by the threat of violence. Racial power is not in our national interest and against the American tradition. The ultimate source of racial power, the moral swamp where it originates, is the agreements made by local racial

faction in ten thousand, or more, different localities in our country.

The City University of New York is as good as locality as any for court consideration, and the instant case as good as any from CUNY.

But adherence to America's traditional view of the individual character of civil rights nullifies the possibilities of morally or politically unthinkable results.

The Supreme Court has the authority to review any and every affirmative action case and to specify the limitations of affirmative action - as the national interest requires.

(i) The following are the opinions of the courts or administrative agencies in the case. The numbering follows the list in 1 (a). For example, the three 1977 documents from Special Term are labeled in reverse chronological order (ix), (ix-2), (ix-3).

(i) The Court of Appeals of the State of New York

Motion Number 517

Entered on July 9, 1979

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

David L. Linfield,

Appellant,

vs.

The Board of Higher Education of the City of New York.

Respondent.

A motion for vacatur of this Court's order of dismissal dated March 27, 1979 or, in the alternative, for leave to appeal to the Court of Appeals having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for vacatur be and the same hereby is denied; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

Signed by Donald M. Sheraw,

Deputy Clerk

(i-2) The Court of Appeals of the State of New York

Letter to Mr. David Laporte
Linfield

Dated: April 23, 1979

Your letter dated April 17, 1979, addressed to this and other courts, at page 2 asks for reconsideration of this Court's March 27, 1979 dismissal of your appeal.

Such letter, however, is insufficient to bring on a motion for reargument (see Rules fo Practice of the Court of Appeals, Section 500.9-[b]).

Signed by Joseph W. Bellacosa,
Clerk of the Court

cc: Michael Rodak, Jr., Clerk,
Supreme Court of the United States

Hon. Martin B. Stecher

Mary P. Bass, Esq.

(i-3) Court of Appeals of the State of New York

Motion Number 279 SSD 24

Dated: March 27, 1979

Present Hon. Lawrence H. Cooke, Chief Judge, presiding

David L. Linfield,

Appellant,

vs.

The Board of Higher Education of the City of New York.

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed

without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Signed by Joseph W. Bellacosa,

Clerk of the Court

(ii) Special Term - First Judicial Department

Motion - attached to Special Term Index No. 77-03635

Presented to the Hon. Justice Sutton. Decided by the Hon. Justice Stecher.

Linfield v. Board of Higher Education of the City of New York

"The motion is denied with leave to renew if the plaintiff is so advised.

I do not understand the relief requested. The letter form the Court of Appeals refers to leave to amend already granted by me, not to leave which may hereafter be granted."

(As reported in the New York Law Journal of March 13, 1979.)

(iii) Court of Appeals

Letter dated December 29, 1978

Re: Linfield v. Board of Higher Education of the City of New York

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte with respect to whether the order sought to be appealed finally determines the proceeding as required by CPLR 5601. It appears that the Appellate Division order of affirmance may leave open Special Term's leave to amend the petition (see Cohen and Karger, Powers of the New York Court of Appeals at page 62). This apparent non-final

aspect of the order may mean that the Appellate Division did not review a constitutional question. If this is so, in the event that the Special Term order is eventually finalized it appears that a direct appeal to the Court of Appeals would be precluded because issues other than a constitutional issue appear to be involved (CPLR 5601[b][2]) and these issues along with any constitutional issue would have to be reviewed together by an intermediate appellate court.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to

be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Signed by Joseph W. Bellacos,
Clerk of the Court

cc: Allen B. Schwartz, Esq.

(vi) Appellate Division - First Judicial Department

Motion: 4071-72

Present: Lupiano, J.P., Silverman, Evans, Lynch, Sullivan, JJ.

Entered: On or about November 28, 1978

Re: Linfield, pet-ap v. The Board of Higher Education of the City of New York

"Order and Judgment (one paper) Supreme Court, New York County (Stecher, J.) entered on November 15, 1977, unanimously affirmed for the reasons stated by Stecher, J. at Special Term. Respondent shall recover of appellant $75 costs and disbursements of this appeal. Order filed."
(As reported in the New York Law Journal of November 30, 1978.)

(IV-2) Appellate Division First Judicial Department

Motion: M-2279

Present: Francis T. Murphy, Jr. P.J.
Theodore R. Kupferman,
Vincent A. Lupiano,
Harold Birns
Arnold L. Fein, J.J.

Entered: July 27, 1978

in the Matter of David L. Linfield,

Petitioner-Appellant,

-against-

The Board of Higher Education of the City of New York

Respondent-Respondent.

The above-named petitioner--appellant, in connection with his

appeal from the judgment of the Supreme Court, New York County, entered on or about November 15, 1977, having moved for disclosure of specified documents, for an enlargement of time to perfect his appeal to December 30, 1979 or one year from the date of the disposition of the first motion by the highest court considering it originally or on appeal, whichever is later, or, if such enlargement is not granted, for an enlargement to a date determined by this court.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the communications of David L. Linfield in support of said motion and the statement of Mary.P. Bass in opposition thereto, and after hearing Mr. David L. Linfield, appearing pro se, for the motion and Mary P.

Bass opposed,

It is ordered that said motion, insofar as it seeks disclosure of specified documents, is denied and, insofar as it seeks an enlargement, is granted so as to extend appellant's time to perfect the appeal to the November 1978 Term of this Court, with the record on appeal, appellant's points and notes of issue to be served and filed on or before October 1978.

ENTER:

Signed: A. Berger,

Deputy Clerk

(V) State of New York Committee on Public Access to Records

Letter signed by Robert J. Freeman

Date: June 27, 1978

Your letter addressed to Secretary of State Cuomo has been transmitted to the Committee on Public Access to Records, which is responsible for advising with respect to the Freedom of Information Law and of which Mr. Cuomo is a member. Your inquiry seeks advice with respect to rights of access to the following records:

> "(a) Report of the City University Task Force considered by the Daily News on December 16, 1975,
>
> "(b) A tape which, in June of 1975, was sent by Brooklyn College to the

> Board of Higher Education Affirmative Action Program, and
>
> "(c) My own, David Laporte Linfield's, administrative file at CUNY."

It is important to emphasize at the outset that the recently amended Freedom of Information Law is based upon a presumption of access. In brief, Section 87(2) of the Law states that all records in possession of government in New York are accessible, except to the extent that records or portions thereof fall within one or more enumerated categories of deniable information. In addition, in a judicial challenge to a denial of access, an agency has the burden of proving that records withheld fall within one or more of the categories of deniable

records listed in Section 87(2).

Central to the controversy is Section 87(s)(g), which states that an agency may deny access to records or portions thereof that:

> "are inter-agecy or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public; or
>
> iii. final agency policy or determinations..."

The quoted provision contains what in effect is a double negative. Although an agency may deny access to inter-agency or intra-agency materials, statistical or factual tabulations or

data, instructions to staff that affect the public or final agency policy or determinations within such materials are accessible. Therefore, in view of the records sought, the questions involve the extent to which portions of the records may be withheld or must be made available.

In terms of the legislative history of Section 87(s)(g), Mark Siegel, the Assembly sponsor of the bill that later became the amended Freedom of Information Law, wrote that:

> "[T]he basic intent of the quoted provision is two-fold. First, it is the intent that any so-called 'secret law' of an agency be made available. Stated differently, records or portions thereof containing

any statistical or factual information, policy, or determinations upon which an agency relies is accessible. Secondly, it is the intent that written communications, such as memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency might not be made available if they are advisory in nature and contain no factual information upon which an agency relies in carrying out its duties. As such, written advice provided by staff to the head of an agency that is solely reflective of the

opinion of staff need not be made available."

At this juncture, I would like to consider the status of the three areas of your request.

First, the report of the City University Task Force is in my opinion accessible at least in part. According to our telephone conversation of June 23, the Task Force report contains both statistical and factual findings as well as recommendations. To the extent that the report contains "statistical or factual tabulations or data," it is clearly accessible. The status of the recommendations, however, is less clear. Since recommendations are essentially advisory in nature, they may potentially be withheld under Section 87(s)(g). Nevertheless, it may be argued that the Task Force is itself

an agency and therefore the recommendations are reflective of its final determinations. As such, although the City University had the ability to accept or reject the recommendations of the Task Force, the recommendations nevertheless represented the final determinations made by the Task Force. To date, there as been one determination rendered with respect to nonfinal recommendations which may be accepted or rejected. In McAulay V. Board of Education City of New York, 403 NYS 2d 116, the Appellate Division, Second Department, held that non-final recommendations rendered at any agency's "predecisional state" need not be made available. While I disagree with the McAulay determination, which I believe is being appealed, the decision is the only one of its kind that deals even tangentially with the status of

recommendations made by an advisory panel under the Freedom of Information Law. However, decisions rendered under the Open Meetings Law have held that advisory bodies with no authority to take final action are public bodies subject to that statute in all respects. Since public bodies are required to compile minutes reflective of their determinations, it would appear th non-binding determinations of an advisory body, such as a task force, would generally be accessible as minutes. Nevertheless, the Task Force in question issued its report prior to the enactment of the Open Meetings Law, which became effective January 1, 1977. Consequently, rights of access to the recommendations under the Freedom of Information Law remain questionable.

The second record in which you are interested is a tape recording containing the details of Brooklyn College's Affirmative Action Program. Although the status of items such as tape recordings was unclear under the Freedom of Information Law as originally enacted in 1974, Section 86(4) of the amended statute defines "record" to include "...any information kept, held, filed, produced or reproduced, by, with or for an agency...in any physical form whatsoever..." Therefore, a tape recording is clearly a record subject to rights of access granted by the Law. Statements made during our conversation indicate that you believe that the contents of the tape recording are largely statistical and factual accounts regarding the implementation of an affirmative action program. To the extent that the tape consists of

statistical or factual tabulations or data, it is available.

And third, you are interested in reviewing the administrative file identifiable to you at the City University of New York. Once again, the provisions of Section 87(2)(g) are determinative. Statistical or factual information contained within the file is accessible. As we discussed, records reflective of advice or impression are likely deniable. However, while there are no decisions rendered under the Freedom of Informion Law that deal with the right of an individual to inspect a personnel file identifiable to him, there is a common law which stands for the notion that an individual may in some cases have a right to inspect records pertaining to him when a specific "interest" can be

demonstrated. It is noted that the concept of "interest" is contrary to the Freedom of Information Law, which is based upon the notion that accessible records must be made equally available to any person, without regard to status or interest. Common law rights of access were predicated upon a showing of interest by a person seeking to inspect records. In this regard, the subject of a record might be able to demonstrate an "equitable" right of access based upon interest, even when records are beyond the scope of rights of access granted by the Freedom of Information Law. If, for example, it can be demonstrated that deniable records have in some way affected you, perhaps the records could be considered determinations and therefore accessible, or in the alternative they might be found to be available based upon

equitable principles.

Enclosed for your perusal are copies of the Freedom of Information Law, regulations promulgated by the Committee that govern the procedural aspects of the Law, a pamphlet entitled "The New Freedom of Information Law and How to Use It," and an earlier advisory opinion that deals with issues similar to those raised in your letter.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Signed: Robert J. Freeman,

Executive Director

(VI) SUPREME COURT OF THE UNITED STATES

Motion: 77-1071

Entered: March 6, 1978

Re: David L. Linfield
v. Board of Higher
Education of the City
of New York

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Signed: Michael Rudak,
Clerk

(VII) The Court of Appeals of the State of New York

Motion Number 1233 SSD 106

Entered on (or about)
January 10, 1978
Present, Hon. Charles D. Brietel,
Chief Judge, presiding

In the Matter of David L. Linfield
Appellant,
vs.
The Board of Higher Education of the City of New York
Respondent.

The appellant having filed notice of appeal in the above title and due consideration having thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without

costs, by the Court sua sponte. A direct appeal does not lie where questions other than the provision are involved (N.Y. Const., art VI, Section 3(b) (2)).

(VII-2) Letter from the Court of Appeals of the State of New York to David L. Linfield

Signed by Joseph W. Bellcosa, Clerk of the Court

Dated: Decemer 12, 1977

Re: David L. Linfield

V.

The Board of Higher Education of the City of New York

Dear Mr. Linfield:

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte with respect to whether a direct appeal to the Court of Appeals is available pursuant to CPLR 5601(b)(2). That provision requires appeal from a final judgment (see also CPLR 5515 requiring entry of judgment) where the only question involved on the appeal is the validity of a statutory provision of the State or of the United States under the Constitution of the State or of the United States. On this appeal where the petitioner seeks, inter alia, amendment of "...the order and judgment...to affirm or deny the petitioner's rights to proceed by independent action..;" "...to have the

arbitrator's award vacated", it appears that appeal pursuant to CPLR 5601(b)(2) is unavailable and appeal, if available, is properly to an intermediate appellate court.

This communication is without prejudice to any motion any party may wish to make. If you conclude tht the order is not appealable as of right, please arrange for the execution of a stipulation consenting to dismissal of the appeal and transmit that paper to my office. If a stipulaion is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your

adversary is likewise afforded this opportunity.

Very truly yours,

Joseph W. Bellacosa

cc: Mary P. Bass, Esq.

(VIII) Letter from the Commission on Judicial Conduct of the State of New York to David Linfield

Signed by William H. Wallace, III, Staff Attorney

Dated: September 12, 1977

Dear Mr. Linfield:

This is to acknowledge receipt of your telegram dated August 31, 1977, by the State Commission on Judicial Conduct.

Your letter contains insufficient information for us to determine whether we can assist you. Please be advised that the Commission has jurisdiction over complaints of misconduct against judges within the unified state court system. The Commission is not a court of law, however, and cannot act in that capacity. It has no jurisdiction to

determine whether a decision or ruling by a judge is correct.

If you would like to make a complaint against a judge, kindly outline your complaint in a letter to the Commission. Your complaint should be as specific as possible regarding the allegations of judicial misconduct.

Very truly yours,

William H. Wallace, III
Staff Attorney

(VIII-2) Letter from the Commission of Judicial Conduct of the State of New York to David L. Linfield

Signed by William H. Wallace, III, Staff Attorney

Dated: November 28, 1977

Dear Mr. Linfield:

The State Commission on Judicial Conduct has reviewed your letter of complaint dated October 12, 1977 and the transcript of your action in Supreme Court. The Commission is also in receipt of your letter and attachments dated November 17, 1977. The Commission has asked me to advise you that it has no jurisdiction over the matter. Please forward your complaint to John Ray, Esq., Office of Court Administration, 270 Broadway, New York, NY 10007, for appropriate action.

Under separate cover, we are returning your transcript.

We regret not being able to assist you.

Very truly yours,

William H. Wallace III

Staff Attorney

(IX) Order and Judgement of the Supreme Court of the State of New York, First Judicial Department

Index Number 03635/77

Signed by Hon. Martin B. Stecher, Justice, and dated November 15, 1977

In the Matter of the Application of David L. Linfield, Petitioner, against the Board of Higher Education of the City of New York

The petitioner herein having commenced this proceeding pursuant to Section 7511 of the CPLR for an order or judgment vacating an arbitrator's award and for other appropriate relief and the petitioner having requested a declaratory judgment declaring the respondent's affirmative action policy to be invalid and the respondent having crossmoved to confirm the award and

moved to stay the arbitration demanded Dec. 4, 1975 by petitioner, and the application having come on to be heard before me on the seventh day of March, 1977,

NOW, upon reading and filing the Notice of Motion to Vacate Arbitration Award dated February 22, 1977, the affidavit by David L. Linfield in support thereof dated February 22, 1977, Answer and Motion to Respondent's Counterclaim affadavit by David L. Linfield in support thereof dated March 7, 1977, Transcripts and Exhibits delivered to the Court by David L. Linfield on March 7, 1977 and Verification thereof by David L. Linfield dated March 7, 1977, Respondent's Answer and Counterclaim to Confirm and Stay in opposition thereto for Bernard W. Richland by Mary P. Bass, Esq., dated

March 2, 1977, and Respondent's Verification by Mary P. Bass, Esq., dated March 2, 1977, and David L. Linfield, Counsel Pro Se, having appeared for Petitioner in support of the application and Mary P. Bass, Esq., having appeared by J. Oliver Gluyas, Esq., of Counsel, in opposition thereto; and due deliberation having been had and upon the decision of the Court dated June 30, 1977 having been rendered, it is

ORDERED and Adjudged that the motion to vacate the award made 12/18/76 by R.L. Stutz, arbitrator, is denied, and Respondent's cross petition to confirm the award is granted to the extent that such judgment shall not effect rights which petitioner may have under 42 USC 2000 (e) et seq and 42 USC 1983

ORDERED that the petitioner's motion for a declatory judgment declaring that the Respondent's "affirmative action program" is unconstitutional and for an order reinstating the petitioner to his former position with back salary and with "de facto tenure" is denied with leave, within sixty (60) days after the entry of this judgment and order, to move in this court to amend the petition pursuant to the provisions of CPLR 103(c) to plead a cause of action under 42 USC 2000e et seq. or under 42 USC 1983 or both, if the petitioner be so advised. Nothing herein contained shall be deemed a determination on the merits concerning the petitioner's right to proceed by independent action under either of the said Federal statutes, and it is further

ORDERED that the petitioner's motion for production of certain records be denied, and it is further

ORDERED that the respondent's "counterclaim" to stay arbitration is dismissed.

ENTER:

JMB (signed)

Justice of the Supreme Court

(IX-2) Decision of the Supreme Court of the State of New York, First Judicial Department, Special Term, Part I

Index Number 03635/77

Signed by Hon. Martin B. Stecher, Justice, and dated June 30, 1977

David L. Linfield, Petitioner, against the Board of Higher Education of the City of New York

STECHER, J.:

This is an application to vacate the award of an arbitrator for a judgment declaring unconstitutional the respondent's program of "affirmative action" by means of "improved employment opportunities for groups which have been disadvantaged in the past;" and for reinstatement to his position, with back salary and "de facto tenure." The respondent cross petitions to confirm the award and interposes a "Counterclaim to Stay Arbitration" on theory that petitioner is seeking to rearbitrate a grievance on which an arbitration has already been had.

Petitioner, a non-tenured faculty member of Brooklyn College, engaged in 1970 to teach remedial mathematics to entering students deficient in that discipline, brought a grievance on behalf of himself and filed two demands for arbitration specifying the nature of the dispute as non-reappointment to a teaching position. He requested appointment as a lecturer at Brooklyn College effective September 1, 1975. The demand for arbitration dated December 4, 1975 cited the arbitration provision and Article 8 of the collective bargaining agreement which provides that neither the union nor the respondent shall discriminate against any employee on various grounds including race. Petitioner claims discrimination against non-Hispanic Caucasians based upon an alleged policy to favor Blacks and Hispanics.

CPLR 7511 (b) (1) provides authority for a court to vacate an award where the movant participated in the arbitration, but only upon a limited number of prescribed grounds. The assertion that the arbitrator so imperfectly executed his power that a final and definite award on the subject matter was not made is patently without merit. Petitioner's grievance was clearly dismissed. In a conclusory fashion, petitioner claims that the arbitrator followed legally impermissible procedures. No instance of the arbitrator's failure to follow the procedure prescribed by Article 75 of the CPLR is specified (CPLR 7511(b)(1)-(iv)). Petitioner misconceives the role of the arbitrator when he complains that the arbitrator did not inquire into certain facts. The

arbitrator does not make an independent investigation into the facts but makes an award based upon the proof presented by the parties.

The petitioner alleges that the arbitrator "covered up the offense of affirmative action against" him. However, no specific act of misconduct by the arbitrator is set forth in the moving affidavit-petition. Petitioner's basic claim in the moving affidavit-petition is that the arbitrator made an erroneous determination and award. The court does not review an arbitrator's award for errors of law or fact (Matter of Wilkens 169 NY 494; Matter of Colletti (Mesh) 23 AD 2d, 245, aff'd 17 NY 2d, 460).

The petitioner, however, appears to state a cause of action pursuant to the provisions of the Equal Employment

Opportunity Act (Pub.L. 88-352, Title 7, sect. 701, et seq., 42 USC 2000 (e) et seq.) and, perhaps under the Civil Rights Act (42 USC 1983). It is his contention that he was denied reappointment to his position by reason of his race or (which is really a distinction with a difference), because he was not a member of a favored race. While the petitioner, who is proceeding pro se, has drawn papers which are less than artful, they must be read "with the required generosity" (Runnels Rosendale 449 F 2d, 733,736; see also Hames v. Kenner, 404 US 519) so that we may glean therefrom the essential allegations rather than be limited by the form in which they appear to be couched. His papers adequately allege a violation of the Equal Employment Opportunity Act.

The word "employers" as used in the statute (42 USC 2000 (e), subd. (b)) includes municipalities (Monell v Department of Social Services, etc. 532 F 2d, 259) and local school boards (Harrington v Valandia-Butler Board of Education, 418 F.S. 603) and quite clearly encompasses the Board of Higher Education of the City of New York. The issue which petitioner submitted to arbitration, the failure of the respondent to retain him in a tenured status, overlaps all of the issues he raises in this proceeding and in other circumstances would be res judicata. Nonetheless, he has not "elected a remedy" by arbitration which will exclude his right to judicial intervention. It has been made clear by our own Court of Appeals that in certain matters of public policy the Courts will not yield their jurisdiction to

arbitrators (Aimcee Wholesale Corp v Lomar Inc., 21 NY 2d, 621) and the right to judicial intervention for violation of the Equal Employment Opportunity Act (42 USC 2000 (e), et seq.) has been held to be precisely such a matter of public policy (Alexander v Gardner-Denver Co., 415 US 36). It is clear from these cases that irrespective of the holding of the arbitrator and any judgment entered herein which may confirm his award, such judgment will in no way have the effect of limiting petitioner's right to proceed under the Equal Employment Opportunity Act (42 USC 2000 (e)) and perhaps under 42 USC 1983.

The disposition of the motions addressed to the arbitration proceedings alone is simple enough: a judgment may be entered confirming the arbitrator's

award to the extent that such judgment shall not affect the rights granted under these statutes (42 USC 1983; 42 USC 2000 (e) et seq.). At the petitioner's option an order may be made dismissing the petition, reserving the right to the petitioner to proceed anew, in the Federal courts or elsewhere, under these federal statutes. On the other hand, dismissal of the petition is not a necessary consequence of confirming the award. Under our statute (CPLR 103 (c)) if relief is sought in an inappropriate form of action, and relief would be available under a different form of action, dismissal is not mandated "but the Court shall make whatever order is required for (the action's) proper prosecution." It thus appears that if this Court has jurisdiction over actions mandated by the Equal Employ-

ment Opportunity Act (42 USC 2000 (e), et seq.) an order maybe made converting the proceeding to set aside the award in arbitration into a proceeding under that statute.

It is not, however, clear (and the parties have not argued the matter) whether it was the intention of Congress to grant to the state courts of general jurisdiction the power of enforcement under that statute. Thus, on the one hand, in Alexander v Gardner-Denver Co., supra, the U.S. Supreme Court on many occasions makes reference to the fact "that federal courts have been assigned plenary powers to secure compliance with Title VII" (at page 45). On the other hand, it has been held, by at least one court, that state courts of general jurisdiction have concurrent juris-

diction to enforce the statute, at least where the action is initiated by the allegedly aggrieved party. (Bennum v Board of Governors of Rutgers, etc. 413 FS 1274). It would be premature to determine such an issue now.

It is for the petitioner to elect whether he wishes to terminate this proceeding and commence a new proceeding in the U.S. District Court which clearly has jurisdiction; or proceed before an administrative body in the first instance as is provided for in the statute; or elect to proceed in this action under amended pleadings on the assumption that state courts of general jurisdiction have jurisdiction of the subject matter of his complaint. Among the considerations which may be involved, are statutes of limitation. These choices will be resolved at least

in part by the petitioner in the judgment to be settled. The matters are of great complexity and petitioner is advised to consult with counsel before initiating a new proceeding or electing to continue this proceeding.

The request for a judgment declaring the respondent's affirmative action policy to be invalid (cf Boryszewski v Brydges, 37 NY 2d 361; People v Lang, 36 NY 2d, 366) is declined (CPLR 3001). The petitioner has an adequate remedy in the form of a direct action to obtain his statutory rights if 42 USC 2000 (e) et seq is applicable to him, and it is unnecessary to have two actions pending involving the same facts and issues. Finally, there is no need to direct production of records at this stage of the proceeding since the dispute is not presently before the

court.

Accordingly, the petition is dismissed to the extent it seeks to set aside the award of the arbitrator without prejudice to seeking relief by court or administrative action pursuant to applicable laws prohibiting discrimination on the basis of race; and the cross-petition to confirm is granted with the same limitation. The counterclaim for a "stay" is dismissed.

Settle judgment.

MBS (signed)

Dated: June 30, 1977

(IX-3) Letter from Justice Martin B. Stecher to Hon. Seymour Bieber

Dated: March 8, 1977

Re: Linfield v Board of Higher Education of New York

This is a matter which may be of considerable sensitivity in that it is an attack on what purports to be the Affirmative Action procedures of the Board of Higher Education of the City of New York. I would hope that you would assign it to a Law Assistant of some experience and ability. It comes to us in the guise of motions and cross motions directed to an award in arbitration and there will be considerable temptation to merely dispose of it as a matter within the arbitrator's discretion.

This is a pro se pleading and should be read "with the required generosity." (Runnels v Rosendale 449 Fed 2d 733,

736; Hames v Kenner 404 US 519). This may be the necessary result but I do hope that careful consideration will be given to the Board of Education claimed underlying right to dismiss the instructor on the eve of tenure, whose dismissal is caused neither by unsatisfactory performance nor financial urgency, but solely by arbitrary determination. This is not a case in which a civil servant servant is discharged during a probationary period.

Despite the language of the foregoing, I have not prejudged this matter but it is merely that I wish to emphasize that additional care must be given to it.

On oral argument Mr. Linfield, the petitioner, said that he demanded production by the City of three items referred to in the petition:

a. Report of the City University Task Force on certain issues here as reported in the Daily News of December 16, 1975.

b. A tape which, in July of 1975, was reported to have been sent by the College to the Board of Higher Education containing details of the College's Affirmative Action program.

If these have not been forwarded, consideration should be given as to whether or not we should order their production.

M.B.S. (signed)

(X) Award of Arbitrator Robert. L. Stutz and his Statement of the Case both dated December 18, 1976

Case Number 1339-0400-75

In the Matter of the Arbitration
between

David L. Linfield, individual grievant

-and-

Board of Higher Education of the City
of New York/Brooklyn College

AWARD OF ARBITRATOR

The undersigned arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated October 1, 1973 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The individual grievance filed by David L. Linfield is dismissed.

Robert L. Stutz (signed)

Statement of the Case

Hearings on this matter were held on May 3, 1976 and September 29, 1976 at the offices of the American Arbitration Association, New York, New York. The grievant, David L. Linfield, appeared for himself. The Board of Higher Education was represented at the May 3, 1976 hearing by L. J. Goodwin, Esq., Associate Counsel, and at the September 29, 1976 hearing by J. Oliver Gluyas, Esq., Associate Counsel. A transcript of the hearings was provided for the arbitrator. The grievant submitted a brief under date of November 18, 1976.

The grievant, David Linfield, was one of a group of 12 Instructors in the Department of Mathematics at Brooklyn

College on whose behalf the Professional Staff Congress filed a class grievance on December 14, 1973 protesting, among other things, what was termed "notice of premature non-reappointment." This notice was included in letters of reappointment for the 1974-1975 academic year. The class grievance also alleged violations of Articles 18 and 20 of the PSC Agreement.

While the class grievance was pending on September 25, 1974, Mr. Linfield was notified by the Chairman of the Department of Mathematics that the Department Committee on Appointments had not approved his reappointment and that, therefore, his appointment at the College would terminate on August 31, 1975.

The Step Two meeting on the class grievance was held on December 7, 1974 and the decision denying the grievance was issued by the Chancellor's designee on February 10, 1975.

Mr. Linfield filed a "personal grievance" on January 5, 1975 alleging that "the actions of the college authorities in not reappointment me as a Lecturer with Certificate of Continuous employment was arbitrary," and seeking as a remedy reappointment effective September 1, 1975. It is this grievance that is the subject of this arbitration. Mr. Linfield is claiming that the Board, in connection with his non-reappointment, has violated: (1) Article 8, Non-Discrimination; (2) Article 12.5, Certificate of Continuous Employment; and (3) his contractual rights as a citizen by changing him

from a Lecturer to an Instructor shortly after his original appointment at Brooklyn College effective September 1, 1970.

The Board urges the arbitrator to dismiss Mr. Linfield's grievance on the ground of res judicata, claiming that this is the same grievace as the class grievance which was denied and was not appealed to arbitration. On the merits, he Board suggests that Mr. Linfield has utterly failed to establish any case in support of his charge of discrimination, and for that reason, too, the grievance should be dismissed.

Opinion

In view of the tangled and tortuous history of Mr. Linfield's differences with the College and the Board of Higher Education over his non-

reappointment for the 1975-1976 academic year, the arbitrator has decided to rule on the merits of Mr. Linfield's claim and to deny the Board's request that it should be dismissed as having been previously decided. Mr. Linfield argued passionately that he is entitled to a hearing on the substance of his claim that he has been the victim of racial discrimination by a "racial faction" at Brooklyn College which he describes as "a white political elite united with Blacks and Hispanics to rule Brooklyn College's remedial program." The gravamen of Mr. Linfield's charge is that he, a native-born caucasian, was denied reappointment while a non-native born black, who has taught the same subjects that he did, was reappointed in 1973 with a Certificate of Continuous Employment. Mr. Linfield cites nu-

merous statistical data about the make-up of the faculty in the Department of Educational Services at Brooklyn College in support of his charges that the College acted illegally and in violation of the non-discrimination clause in the Agreement by pursuing a policy of affirmative action in the employment of minority persons.

After reviewing the extensive record in this matter, consisting of the transcript of two full hearing days, over 70 exhibits and Mr. Linfield's 270-page brief, the conclusion here has to be that the record does not support Mr. Linfield's charge of discrimination in violation of Article 8. Nor is there any support to his claim that the Board has violated Article 12.5, the Certificate of Continuous Employment provi-

sion. His charge that his contractual rights as a citizen were violated back in the Fall of 1970, in addition to being without merit, came much too late to come within the aegis of the grievance being considered here.

Much of Mr. Linfield's argument goes to his criticism of the quality of the administration of the remedial program at Brooklyn College and his rights and privileges of citizenship, both areas beyond the arbitrator's jurisdiction.

In support of his claim that he was discriminated against, Mr. Linfield states: "It is illegal and against the contract to act on the belief that minority lecturers or instructors are more likely to meet the needs of minority students in Brooklyn College's remedial program than white lecturers or instructors." However, Mr. Linfield

failed to prove by any credible evidence that the College had, in fact, acted on such belief when it awarded a Kenya-born, black lecturer, who had been at Brooklyn College two years longer than he, a Certificate of Continuous Employment in 1973. Nor did the statistical data offered in evidence by Mr. Linfield establish any such claim.

Mr. Linfield seems to be saying that he was entitled to reappointment for the 1975-1976 academic year and for a Certificate of Continuous Employment under Article 12.5 because he had received no unsatisfactory evaluations, but it has been well established that there is no presumption of reappointment under Board policy and thus under the Agreement which governs this dispute. The Board concedes that Mr.

Linfield was a satisfactory teacher and so his teaching performance is not at issue. There is nothing in the record to suggest that the decision not to reappoint Mr. Linfield was not in accord with the regular procedures in effect at the College, nor that it was based on other than academic judgment.

Since the non-reappointment of Mr. Linfield did not violate any term of the Agreement, was in accord with the written policies and bylaws of the Board, and did not constitute an arbitrary or discriminatory application of the bylaws or written policies of the Board, his grievance must be dismissed.

Robert L. Stutz (signed)
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